IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 14, 2008

STATE OF TENNESSEE v. JAMES GLADDEN, JR.

Direct Appeal from the Circuit Court for Marshall County
Nos. 17588, 17589 Robert Crigler, Judge

No. M2007-02099-CCA-R3-CD - Filed July 15, 2008

The Defendant pled guilty to two counts of theft of property valued at more than $1000 but less than $10,000 in case number 17588 and two counts of theft of property valued at more than $1000 but less than $10,000 and one count of aggravated criminal trespassing in case number 17589. The trial court merged the two theft counts in case number 17588 and merged the two theft counts in case number 17589, and it imposed an effective sentence of four years of incarceration. On appeal, he claims the trial court ordered an excessive sentence and one contrary to the law. After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J.C. MCLIN and D. KELLY THOMAS, JR., JJ., joined.

Michael J. Collins, Shelbyville, Tennessee, for the Appellant, James Gladden, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; David H. Findley, Assistant Attorney General; Charles F. Crawford, Jr., District Attorney General; Weakley E. Barnard, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

At the guilty plea submission hearing, the State presented to the court the evidence supporting the Defendant's conviction:

> In case [175]88 they [the State's witnesses] would testify that events occurred between the 7th day of April, 2007 to the 10th day of April, 2007. At that time the

[D]efendant was working a part-time job or a job at Sanford Incorporated here in Lewisburg.

There was some metal fittings there that were valued at quite an extensive amount of money. Valued at between a thousand to a little less than $10,000.

The [D]efendant took these fittings from his place of employment and he sold those fittings to a scrap dealer here in Marshall County, Tennessee.

Actually Sanford employees went out and did their own investigation. When they found their fittings were missing, they went out and located the fittings, identified them to the scrap metal dealer before they called the police. Then they called the police in and the detective investigated this matter; he spoke to [the Defendant]. At the time he spoke to him [the Defendant] gave a written statement wherein he said due to dire economic difficulties, I [the Defendant], took items from Sanford, Incorporated to be scrapped at East Commerce Metal for extra money to provide for my family. At that time I was in the process of being evicted from my residence at 828 Weaver. My lights had been turned off. My wife Bridget Dial Gladden was incarcerated and is seven months pregnant. I was completely overwhelmed by my financial hardship and felt hopeless and scared. I worked for Sanford and Holland off and on for two years and my work history is of dependability.

I asked the Court to show me mercy. I did it for no other reason but to try to keep my home and family satisfied. I am truly and deeply sorry for all of the trouble I have caused.

Sincerely, [the Defendant].

So in fact he admitted it. Also a photo line-up was shown to the people at the scrap metal dealership where they also identified him. There would be receipts for the sales of the merchandise to show that he did sign for the monies that were obtained for selling the stolen merchandise and he would be pleading open to that particular indictment.

In case number 17589 the witnesses would testify that this occurred on April 17th, 2007 in count 1, 2, and 3.

At that time the CSX Railroad had some metal parts that they were using for railroad repair sitting on the side of the track on the railroad property.

They got a phone call from another scrap metal dealer here in Marshall County telling them that the metal dealership believed that they had just purchased

railroad property.

> The CSX investigator along with the police went down to Harmon's Scrap Metal dealership where they discovered that there was quite an extensive amount of their property down there. While there another load came in and it was [the Defendant] along with another individual delivering more of the same stolen property. This property they would say was valued at $1000 and less than $10,000.
>
> In that particular case [the Defendant] confessed to removing – I am reading the wording of the CSX investigator says he interviewed [the Defendant] where he confessed to removing the plates, which is what they call the metal property, from the railroad and selling them to the scrap yard. He got a written statement where he says on Monday morning I went and loaded several pieces of steel from a gravel road next to the baseball field in Lewisburg on Tuesday 4-17-07 around 8:00 a.m.
>
> I went and picked up Nathan Dial and we took a load of steel to Harmon's. I then dropped Nathan off at his house; went back to the gravel road. Loaded my truck up again with steel plates. I went and picked up Nathan and we went back to Harmon's.
>
> Then I took Nathan home again. I then went and loaded my truck up again with steel plates; went and picked up Nathan and went to 'Harmon Scrap Metal. All three trips Nathan was with me. Me and Nathan split all of the money. I did not know I was stealing anyone's property. I am truly sorry.
>
> Signed [the Defendant], 4-17-07.

At the guilty plea submission hearing, the Defendant agreed with the State's statement of evidence, except he clarified that Nathan Dial was with him the entire time. The trial court the accepted the Defendant's guilty pleas.

At the sentencing hearing, the following evidence was presented: Beth Flatt, who works for the Tennessee Probation and Parole Department, testified that she prepared the Defendant's presentence report. She discussed some of the Defendant's demographic information, and then she reviewed his statements to the police. In his statements, the Defendant was consistent that he made three trips with a juvenile, who was his brother-in-law, to take scrap metal and sell it for money. Flatt also stated the Defendant had three prior felonies: two for theft of property and one for possession of cocaine. Those felonies were from Alabama.[1] The Defendant also said he had served in the Navy, but Flatt had yet to receive confirmation of that fact from the Navy.

[1] Certified copies of the convictions were not offered to the trial court, and, therefore, it did not consider these convictions when determining the Defendant's "Range" for sentencing purposes.

On cross-examination, Flatt said the Defendant cooperated, and he gave two separate statements. She said he stole brass from his employer, Sanford, to provide for his family. She also agreed that one time after he had violated his probation, he was put back onto probation. Finally, Flatt characterized the Defendant's employment as consistent, although at several different temporary agencies.

Tim Dunn, a security officer employed by CSX Transportation Railroad, testified that he caught the Defendant and a juvenile driving away with "tie plates," plates of metal that hold the rail to the tie, in their truck. He said he caught them on their third trip, and most of the stolen material was returned to the company.

The Defendant invoked his Fifth Amendment right to not incriminate himself and chose not to testify.

The trial court then sentenced the Defendant to an effective four year sentence of incarceration. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant claims the trial court imposed an excessive sentence and one contrary to the law. When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). Specific to the review of the trial court's finding enhancement and mitigating factors, the 2005 Sentencing Amendment effectually "deleted" appellate review of how the trial court weighed the factors because it rendered the factors "advisory." *State v. Karl Daniel Forss*, No. E2007-01349-CCA-R3-CD, 2008 WL 253541, at *3 (Tenn. Crim. App., at Knoxville, Jan. 30, 2008), *no Tenn. R. App. P. 11 application filed*. Therefore, an error in the trial court's application of the enhancement or mitigating factors "will not necessarily require modification of the sentence if the sentence record reflects that in determining the specific sentence length, the trial court considered the provisions of Tennessee Code Annotated section[] 40-35-210(b)." *Id.*

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

In this case, the trial court sentenced the Defendant to four years of incarceration. The parties agreed and the trial court found the Defendant was a Range I offender. In its consideration of enhancement factors, the trial court found enhancement factor (1), the defendant has a previous history of criminal convictions or criminal behavior. T.C.A. § 40-35-114(1) (2006). The trial court also found "indicia" that the Defendant was a leader in these crimes. *See* T.C.A. § 40-35-114(2). Reviewing the Defendant's probation records, the trial court found that he failed to comply with conditions of a sentence releasing him into the community. *See* T.C.A. § 40-35-114(8). Finally, the court also found that the defendant abused a position of public or private trust because the Defendant used his position as an employee to steal brass from his employer. *See* T.C.A. § 40-35-114(14). Discussing the weight it gave certain factors, the court said it placed "enormous weight" on both factors (1) and (8).

The trial court also found several applicable mitigating factors. It noted that the Defendant's crimes did not cause or threaten serious bodily injuries and that he was motivated to provide necessities. *See* T.C.A. § 40-35-113(1), (7) (2006). The trial court said it placed "very slight weight" on the motivation mitigating factor, explaining that "the Defendant has not taken the stand, and he has a motive to be self serving." The trial court subsequently ordered a four year sentence for each of the four felony convictions, and a sentence of eleven months and twenty-nine days for the misdemeanor conviction. The trial court ran the sentences concurrently, resulting in an effective four year sentence.

The trial court then denied alternative sentencing options because the Defendant's "social history is poor, his work history is poor," he admitted being court-martialled while enlisted in the Navy, and less restrictive measures in the past have not been successful. Further explaining the denial of alternative sentencing, the court stated:

> [T]he Defendant received alternative sentencing in the past, less restrictive measures than confinement have frequently been applied to the Defendant also relatively recently given there are three of them. They have all been unsuccessful. It's also confinement is needed to avoid depreciating the seriousness of these offenses. Confinement is particularly suited to provide an effective deterrent to people likely to commit similar offenses.
>
> Those two either and/or certainly in conjunction are sufficient to deny alternative sentencing. As I said, I have also found that his potential for rehabilitation is poor.

. . . .

> Confinement is needed to protect society from a defendant who has a long history of criminal conduct. The Defendant does have a history of criminal conduct, so that is a factor even though number 1 in an of itself would not be enough to deny alternative sentencing.

Completing a de novo review of the sentence, we conclude the trial court followed the statutory sentencing procedure when it sentenced the Defendant, and the Defendant failed to overcome the presumption of correctness. *See* T.C.A. §§ 40-35-210 (2006) and 40-35-401. The Defendant, a Range I offender, was convicted of two Class D felonies (theft of property valued at between $1,000 and $10,000) and one Class A misdemeanor (aggravated criminal trespassing). The statutory sentencing range for each felony is two to four years, and the statutory sentencing range for the misdemeanor has an upper limit of eleven months and twenty-nine days. The Defendant has a history of criminal convictions including traffic offenses, theft of property, and possession of drugs. He also has three felonies and at least four probation violations from Alabama. These are sufficient facts for enhancement factors (1) and (8). T.C.A. § 40-35-114. Additionally, specific to this crime, the Defendant led a juvenile to participate in this theft, and he used his employee position at Sanford to locate scrap metal to sell for a profit. These sufficiently support a finding of enhancement factors (2) and (14). *Id.*

As for mitigating factors, the Defendant's crimes did not put any person at risk for serious bodily injury, which is mitigating factor (1). T.C.A. § 40-35-113. He also repeatedly said he stole the metal to make money for his family, which is factor (7). *Id.* Additionally, we note the Defendant's apparent honesty with the police. Considering the enhancement and mitigating factors, we conclude a sentence of four years of incarceration for each felony, to be served concurrently, and a sentence of eleven months and twenty-nine days, to run concurrently with the other sentences, is appropriate.

It is unclear whether the Defendant takes issue with the trial court's denial of alternative sentencing. We will address it in the interest of thoroughly adjudicating his claim. The Tennessee Supreme Court noted recently that, due to the 2005 sentencing amendments, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. *State v. Carter*, — S.W.3d — , 2008 WL 2081247, at *10 (Tenn. 2008) (citing T.C.A.§ 40-35-102(6) (2006)). Instead, a defendant not within "the parameters of subdivision (5) [of T.C.A. § 40-35-102], and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." *Id.* Moreover, a trial court is "not bound" by that advisory sentencing guideline. T.C.A.§ 40-35-102(6). If a defendant seeks probation, then that defendant bears the burden of "establishing [his] suitability." T.C.A. § 40-35-303(b) (2006). As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303 (2006), Sentencing Comm'n Cmts.

When sentencing the defendant to confinement, a trial court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103 (2006).

On review, we conclude the trial court properly denied the Defendant alternative sentencing. The Defendant has three prior felonies, including two for theft of property. He also has other convictions including traffic offenses, theft of property, and possession of drugs. Confinement is necessary to protect society from the Defendant because he has a long history of criminal conduct. Confinement is also necessary to avoid depreciating the seriousness of the offenses. The Defendant stole a significant amount of valuable industrial property from two companies, the railroad and his employer. Additionally, measures less restrictive than confinement have not been successful with the Defendant. He has violated prior probation terms several times. We conclude, as the trial court did, that alternative sentencing is not appropriate in this case. As such, the Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and applicable law, we conclude the trial court correctly sentenced the Defendant. As such, we affirm the trial court's judgments.

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ROBERT W. WEDEMEYER, JUDGE